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No. 81-2213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*, *Appellants*,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals Of The State Of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

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This response is filed to point out a few of the obvious problems contained in the Motion To Dismiss filed by Appellees in this case.

1. Appellees make much of the fact that the Federal Constitutional issue was not raised in any document before the North Carolina trial court, the Superior Court. Yet nowhere do they deny Appellants' statement (Jurisdictional Statement p. 5) that the Federal Constitutional issue was raised in oral argument by the Appellants before the Superior Court. Appellees go on to make the naked assertion that the fact that "the constitutional question *was* 'argued' in the Superior Court—unsupported by any documentary evidence in the record—is not sufficient to raise a federal constitutional question." (emphasis supplied) (Motion To Dismiss, p. 14.) In addition to not contesting that it was so "argued," Appellees cite no authority for their assertion that argu-

ment of a Federal Constitutional issue at the trial level is an insufficient manner of raising the issue. Moreover, Appellees' argument is contrary to this Court's ruling in *Webb* v. *Webb*, 451 U.S. 493 (1981), that the Court has "not insisted on such an inflexible specificity." *Id.* at 501. Rather, the Court has made clear that the requirement that a federal claim be raised in state courts is satisfied "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 496-97. We respectfully suggest that the mere statement of Appellees' proposition to the contrary is sufficient to show its absurdity.

2. Appellees also contend vigorously that Appellants failed to raise the Constitutional issue presented here in its Assignment of Error to the North Carolina Court of Appeals. Appellees, demonstrating commendable candor, tell this Court (Motion To Dismiss, p. 17) that Appellants' Assignment of Error No. 5 reads, "in potential conflict with Constitutional rights of patients, employees, business associates, and all persons entitled to privacy concerning private records . . . ." We respectfully submit that that is a clear raising of the Constitutional right of privacy by any reasonable construction of the English language. Appellees, however, would like to have had a specific Constitutional provision recognizing the right of privacy. But, as this Court well knows, there is no such provision; rather, the right arises from the "penumbra" of several Constitutional provisions. We respectfully suggest that the language used in Assignment of Error No. 5 is a sufficient reply to Appellees' argument that the issue was not raised. [1]

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[1] *See*, this Court's recent statement in *Webb* v. *Webb*, 451 U.S. 493, 501 (1981):

> Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the feder-

3. It is true that the Constitutional argument was not raised explicitly in the Petition for Discretionary Review filed in the North Carolina Supreme Court, and that better practice would call for explicit expression of the argument in that document. But the fact remains that the North Carolina Supreme Court did not review this case and the issue was explicitly raised before every North Carolina Court—trial and appellate—which did review this case. Moreover, the Petition for Discretionary Review was presented in the context of the entire record before the North Carolina Supreme Court, including the language of Assignment of Error No. 5. We respectfully submit that this situation satisfies the review requirements of each of the many cases that Appellees have cited and quoted to this Court.

4. Appellees further contend that the decision of the North Carolina Court of Appeals rests upon an adequate and independent state ground (Motion To Dismiss, pp. 25-27). The only state ground presented by Appellees is that the Court of Appeals held as a matter of state law

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> al statute on which they rely, we have not insisted on such inflexible specificity. . . . At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

(Emphasis in the original.) That Appellants raised a Federal Constitutional issue before the state courts is beyond doubt. *See, e.g.*, Appellants' Court of Appeals brief p. 32 ("rights of privacy protected under the First Amendment of the United States Constitution. GRISWOLD v. CONNECTICUT, 381 U.S. 479 . . . (1956) (*sic*)" and other decisions of this Court), p. 33 ("expectation of privacy was such that it must be observed in an ordered society. Cf. KATZ v. UNITED STATES, 389 U.S. 347 . . . (1967)"), pp. 36-37 ("reasonable expectation of privacy . . . KATZ v. UNITED STATES, *supra*").

that the Hospital was a state agency and that its records were open to inspection. Appellants agree that that is what the Court of Appeals held. But that holding does not meet Appellants' argument before the Superior Court and before the Court of Appeals—including Assignment of Error No. 5—that such a holding violates the Constitutional right to privacy. Appellees also contend that Appellants' failure to raise the federal issue properly is another adequate state ground for affirmance. The short answer is that the North Carolina Courts did *not* so hold, and, indeed Appellees do not contend that the North Carolina courts so ruled. Of course, as shown above, the federal issue was in fact raised before every North Carolina court which has reviewed this case.

5. Appellees correctly advise this Court that the Florida Supreme Court has reversed the ruling of the Florida District Court of Appeals which the Jurisdictional Statement in this case (p. 7) presented as one of two examples in which the Federal Constitutional right to privacy was held to supercede a state statute that would have forced disclosure of information. *Shevin* v. *Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980), reversing *Byron, Harless, Schaffer, Reid and Associates, Inc.* v. *State of Florida*, 360 So.2d 83 (Fla. Dist. Ct. App. 1978). Counsel regrets that this information was not presented in the Jurisdictional Statement.

Yet, the point of the Florida Court of Appeals case has not been vitiated. The Florida Supreme Court held that there was no legitimate expectation of privacy at stake in that case, not that Florida statutes could eliminate such an expectation of privacy. Here the expectation of privacy is clear: communication about pending litigation, including communication between client and counsel. Once

that fact is established, the Florida Court of Appeals' holding that the Federal Constitution does not allow a state law to abrogate that right is a correct one which the Florida Supreme Court does not reverse.

6. Finally, Appellees argue that North Carolina law exempts written communications with counsel from disclosure under the North Carolina Public Record Law. Appellees contend (Motion To Dismiss, p. 4) that North Carolina G.S. § 132-1.1 "is an affirmative exemption of written communications of counsel . . . from 'public records' as defined by G.S. § 132-1" and, here, presumably, from a duty to disclose. This is a curious contention for several reasons: first, if true it would be a complete answer to this entire case and obviate the next 24 pages of Appellees' Motion To Dismiss; second, this apparently complete answer to Appellants' contentions does not again appear in the Motion To Dismiss. The reason for both of these situations, we respectfully submit, is apparent from the language of G.S. § 132-1.1 itself which provides no such expectation but only a hiatus of three years:

> provided, however, that such written communication and copies thereof shall become public records as defined in G.S. 132.1 three years from the date such communication was received by such public board, council, commission or other governmental body.

Thus, Appellees' contention is completely contrary to the explicit statutory language.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully urged that the Motion To Dismiss be denied.

Respectfully submitted,

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